

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





# 76-1158

To be argued by  
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,  
  
Plaintiff-Appellee,  
  
-against-  
  
ARONA FARY DIOP,  
  
Defendant-Appellant.

B  
P/S

Docket No. 76-1158

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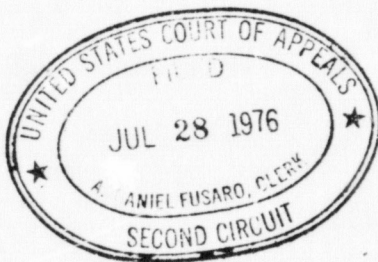
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APPENDIX TO APPELLANT'S BRIEF

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ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER ESQ.,  
THE LEGAL AID SOCIETY,  
Attorney for Appellant  
ARONA FARY DIOP  
FEDERAL DEFENDER SERVICES UNIT  
509 United States Court House  
Foley Square  
New York, New York 10007  
(212) 732-2971

JONATHAN J. SILBERMANN,  
Of Counsel.

PAGINATION AS IN ORIGINAL COPY



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District Office

DIOP, ARONA EARY

U.S. CODE SECTION 21-952(a)960(a)(1) Did import into the US and possess with intent to distribute opium

and 841(a)(1)

(s) 21:841(a)(1) Did possess w/intent to distribute opium

(s) 21:952,960(a)(1) Did import into the U.S. opium

U.S. Attorney or Asst. Samuel Dawson

Defender: CIA, X Petri, Waived, L Self, L None, L Other, L PD, L CD.

Joseph Panzer  
305 Broadway, NYC.  
962-2243

Magr. CASE NO. 75 M194

BAIL & RELEASE

☐ Personal ☐ Unsecured ☐ Conditional

Set (000) \$ 50 ☐ 10% Deposit ☐ Surety Bond

☐ Bail Not Made ☐ Collateral ☐ d. Party Custody

☐ Bail Status Changed (See Docket) ☐ PSA

ARREST 11/8/75 or U.S. Custody Began on Above Charges

INDICTMENT 11-18-75 Information ☐ High Risk Defn. & Date Design'd ☐ Waived ☐ Superseding Indict/Info ☐ 12/16/75

ARRAIGNMENT 12/3/75 1st Plea ☐ Final Plea ☐

TRIAL Trial Set For 12/23/75 Voir Dire 12/23/75 Trial Began 12/23/75 Trial Ended 12/29/75

SENTENCE Disposition 12/29/75 ☒ Convicted ☐ On All Charges ☐ On Lesser Offense(s) ☐ Dismissed ☐ WOP ☐ WIP ☐ Nolle/Discontinued\*

Search Warrant Issued ☐ Return ☐ Summons Issued ☐ Served ☐ Arrest Warrant ☐

COMPLAINT 11/8/75 MA/070B

OFFENSE (In Complaint) Importation of narcotics controlled drug substance. T-21 USC Section 952(a).

INITIAL APPEARANCE PRELIMINARY EXAMINATION OR REMOVAL HEARING ☐ Waived ☐ Not Waived

DATE 11/19/75 Date Scheduled ☐ Date Held ☒ Intervening Indictment

OUTCOME ☐ Dismissed ☐ Exonerated ☒ Held for District GJ ☐ To Transferee District ☐ Held to Answer to U. S. District Court

AT: EDNY Magistrate's Initials MS/070B

Show last names and suffix numbers of other defendants on same indictment/information

DATE 11/8/75 11/18/75 11-18-75 12-2-75 12-2-75 12-3-75 12/16/75 12/22/75

PROCEEDINGS

AUSA - WEINBACH. D.C. will get own.

Indictment filed. See 75 CR 873.

Before COSTANTINO J - Indictment filed.

Before DOOLING J - case called - deft not present - defts atty J. Panzer moves for a reduction of bail - motion denied - pleading adjd to Dec. 3, 1975 - trial scheduled for 12-22-75 to follow defts counsels engagement in 75 CR 272.

Notice of Appearance filed.

Before DOOLING J - case called - deft & counsel Joseph Panzer present - N'Diaye sworn as interpreter - deft arraigned and enters a plea of not guilty - deft renews motion for a reduction of bail - motion denied.

SUPERSEDING INDICTMENT FILED (Before JUDD, J.)

Before DOOLING, J. - Case called - Deft and counsel J. Panzer and A. Wallach present - G. N'Diaye interpreter present - Deft arraigned (75CR873) and enters a plea of not guilty - Margarita Mensa sworn as a interpreter - Govt rests - Hearing adjd awaiting arrival of govt witness - Glory selection portion of trial ordered and begun - Deft moves for the declaration of a mistrial - Motion denied - Motion to Suppress adjd to 12/22/75

Jury selection adjd to 12/23/75

V. Excludable Delay

(a) (b) (c) (d)

OPPOSITE THE APPLICABLE DOCKET ENTRIES IN SECTION IV SHOW, IN SECTION V, ANY OCCURRENCE OF EXCLUDABLE DELAY PER 18 USC §3161(h) - "SPEEDY TRIAL ACT".

DATE	V. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
12/23/75	Before DOOLING, J. - Case called- deft and counsel present-suppression hearing resumed-interpretter sworn-hearing concluded-motion to suppress granted except for portion of questioning of deft by Charles Grabbatin-trial ordered and begun as to superseding indictment-jurors selected and sworn-trial contd to 12/24/75				
12/24/75	Stipulation of accepting verdict of less than 12 jurors, etc. filed				
12/24/75	Before DOOLING, J. - Case called- deft and counsel present-govt rests-deft's motion for judgment of acquittal- motion denied-trial contd to 12/26/75				
12/26/75	Before DOOLING, J. - Case called- deft and counsel present-trial resumed-interpretter present-deft rests-both sides rest-deft moves for judgment of acquittal-motion denied- trail contd to 12/29/75				
12/29/75	Before DOOLING, J. - Case called- Deft and counsel J. Panzer present-G. Diaye present as interpretter-Trial resumed-Govt's summation-Deft's summation -Govt's rebuttal summation-Jury charged-Marshall's sworn-Jury retires to deliberate-The jury returns with a verdict of guilty as to all counts(Counts 1-4)- Jury discharged-Trial concluded-Deft moves to set aside the verdict and renews his motion for judgment of acquittal not with standing the verdict-Motion denied.				
12/29/75	By DOOLING, J. - Order of Sustenance dated 12/29/75 filed.				
12/30/75	Stenographers Transcript dated 12/22/75 filed				
2-20-76	Before DOOLING J - case called - deft & counsel J. Panzer present - Mr. Diaye sworn as interpretter - adjd to March 26, 1976 at the request of counsel for the deft.				
3-2-76	Notice of Motion filed pursuant to Rule 33 for a new trial, etc.				
3/3/76	Memorandum from Judge Dooling setting motion for new trial for 3/10/76 at 9:30 A.M. filed				
3-10-76	Before DOOLING J - case called - deft & counsel J. Panzer present - Gargui N. Diaye sworn as interpretter - hearing on motion for a new trial ordered and begun - hearing contd to March 12, 1976 at 2:00 P.M.				
3-10-76	Notice of Motion filed for a new trial on the ground of newly discovered evidence, etc.				
3-19-76	Before DOOLING J - case called - deft & atty J. Panzer present - Jack M. Trabout sworn as interpretter - hearing resumed - hearing concluded - decision reserved.				
3/23/76	By DOOLING, J. - Memorandum and Order filed denying motion to set aside verdict and for a new trial				
3-23-76	4 stenographers transcripts filed (pgs 1 to 352)				
3-26-76	Before DOOLING J - case called - deft & atty J. Panzer present. Jack Trabout sworn as interpretter - deft is sentenced to imprisonment for 3 years and in addition special parole term of 3 years on each count, to run concurrently. On motion of AUSA Teitler the indictment is dismissed. Deft advised of right to appeal. Clerk directed to file a Notice of Appeal forthwith without payment on behalf of the deft.				
		(a)	(b)	(c)	(d)
		Interval	Start Date	Ltr. Total	
		(for Section II)	End Date	Code	Days





RJD:SHD:sd  
F. #753703

FILED  
IN CLERK'S OFFICE  
U.S. DISTRICT COURT E.D. N.Y.

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NOV 18 1975

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

----- X TIME AM.....  
P.M.....

UNITED STATES OF AMERICA

Cr. No.

(T. 21, U.S.C., §952(a),  
§960(a)(1) and §841(a)(1))

- against -

ARONA DIOP,

Defendant.

----- X

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 6th day of November 1975, within the Eastern District of New York, at John F. Kennedy International Airport, Jamaica, Queens, New York, the defendant ARONA DIOP, did knowingly and intentionally import into the United States from Abidjan, Ivory Coast, approximately nine hundred and fifty (950) grams of opium, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, §952(a) and §960(a)(1)).

COUNT TWO

On or about the 6th day of November 1975, within the Eastern District of New York, the defendant ARONA DIOP did knowingly and intentionally possess with intent to distribute approximately nine hundred and fifty (950) grams of opium, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, §341(a)(1)).

A TRUE BILL.

*William J. Egan*  
\_\_\_\_\_  
FOREMAN

*David G. Trager*  
\_\_\_\_\_  
DAVID G. TRAGER  
UNITED STATES ATTORNEY  
EASTERN DISTRICT OF NEW YORK

(1)



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA

- against - U.S. DISTRICT COURT E.D. NY

ARONA DIOP,

Defendant.

DEC 16 1975

TIME AM.....

----- PM.....X...

SUPERSEDING INDICTMENT

Cr. No. 75 CR 873(s)  
(T. 21, U.S.C. §952(a)  
§960(a)(1) and  
841(a)(1))

THE GRAND JURY CHARGES:

COUNT ONE:

On or about the 6th day of November, 1975, within the Eastern District of New York, at John F. Kennedy International Airport, Jamaica, Queens, New York, the defendant, ARONA DIOP, did knowingly and intentionally import into the United States from Abidjan, Ivory Coast, approximately nine hundred and fifty (950) grams of opium, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, §952(a) and §960(a)(1)).

COUNT TWO

On or about the 6th day of November, 1975, within the Eastern District of New York, the defendant, ARONA DIOP, did knowingly and intentionally possess with intent to distribute approximately nine hundred and fifty (950) grams of opium, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, §841(a)(1)).

COUNT THREE

On or about the 6th day of November, 1975, within the Eastern District of New York, at John F. Kennedy International Airport, Jamaica, Queens, New York, the

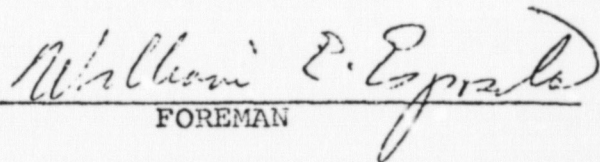


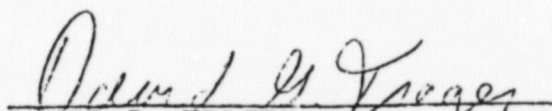
defendant, ARONA DIOP, did knowingly and intentionally import into the United States from Abidjan, Ivory Coast, approximately thirty-two (32) kilograms of marijuana, in the form of hashish, a Schedule I controlled substance. (Title 21, United States Code, §952(a) and §960(a)(1)).

COUNT FOUR

On or about the 6th day of November, 1975, within the Eastern District of New York, at John F. Kennedy International Airport, Jamaica, Queens, New York, the defendant, ARONA DIOP, did knowingly and intentionally possess with intent to distribute approximately thirty-two (32) kilograms of marijuana, in the form of hashish, a Schedule I controlled substance. (Title 21, United States Code, §841(a)(1)).

A TRUE BILL

  
FOREMAN

  
DAVID G. TRAGER  
United States Attorney  
Eastern District of New York

## Charge of the Court

1  
2 THE COURT: Members of the jury, you have heard  
3 the evidence in the case and the arguments of counsel  
4 and now must receive the instructions on the law that  
5 governs the case.

6 You, the jurors, are the sole judges of the  
7 facts. You must, however, follow the law as given to  
8 you in these instructions and apply it to the facts  
9 as you find them from the evidence before you. You  
10 are not free, nor am I, to substitute our private  
11 judgments as to what the law should be for what the  
12 law in fact is.

13 You have been sworn as jurors well and truly  
14 to try this case and to render a true verdict. You  
15 must therefore exclude from your deliberations all  
16 bias and prejudice. You must not permit yourselves to  
17 be governed by sympathy or any other considerations  
18 not founded in the evidence and these instructions on  
19 the law.

20 The issues of fact to be tried are those made  
21 by the indictment and the defendant's pleas of "Not  
22 guilty." Bear in mind that the indictment is the formal  
23 method of accusing a person of a crime; it is not  
24 itself evidence that a defendant committed the crime  
25 charged, nor is the fact that the indictment was found



any evidence of guilt.

The charges of the indictment have been found under two different sections of Title 21, United States Code, dealing with what are called "controlled substances." Under the provisions of Section 812(c), marijuana, in the form of hashish, is a controlled substance. Under the provisions of Section 812(c), Schedule 2(a)(1), opium is a controlled substance, and under the provisions of Section 802(16)(a), is a narcotic drug-controlled substance.

Counts One and Three of the indictment are drawn under Sections 952(a) and 960(a)(1) of Title 21, which so far as we are concerned with them, provides that, "It shall be unlawful to import into the United States from anyplace outside thereof, any controlled substance."

Count One, charging importation of opium, reads as follows:

On or about the sixth day of November, 1975, within the Eastern District of New York, at John F. Kennedy International Airport, Jamaica, Queens, New York, the defendant Arona Diop did knowingly and intentionally import into the United States from Abidjan, Ivory Coast, approximately 950 grams of opium,

45

## Charge of the Court

a Schedule 2 narcotic drug-controlled substance.

The essential elements of Count One of the indictment, all of which the Government must prove beyond a reasonable doubt, or else you must acquit the defendant on Count One, are the following.

First, that the defendant caused to be brought or brought a quantity of opium into Kennedy Airport from abroad;

And, second, that the defendant knew that the substance being brought into the United States was opium or some other narcotic drug;

And, third, that the defendant understood that he was acting illegally.

If the Government proves each one of these three essential elements beyond a reasonable doubt, then you must find the defendant guilty on Count One. If the Government fails to prove any one or more of the three essential elements of Count One beyond a reasonable, then you must acquit the defendant on Count One.

Count Three, charging importation of marijuana, reads as follows:

On or about the 6th day of November, 1975, within the Eastern District of New York, at John F. Kennedy International Airport, Jamaica, Queens, New York,



the defendant, Arona Diop, did knowingly and intentionally import into the United States from Abidjan, Ivory Coast, approximately 32 kilograms of marijuana, in the form of hashish, a Schedule 1 controlled substance.

The essential elements of Count Three are similar to those of Count One. The Government must prove beyond a reasonable doubt all of the following:

First, that the defendant caused to be brought or brought a quantity of marijuana, in the form of hashish, into Kennedy Airport from abroad; and, second, that the defendant knew that the substance being brought into the United States was marijuana in the form of hashish or some other illicit drug; and,

Third, that the defendant understood that he was acting illegally.

If the Government proves each one of these three essential elements beyond a reasonable doubt, then you must find the defendant guilty on Count Three. If the Government fails to prove any one or more of the three essential elements of Count Three beyond a reasonable doubt, then you must acquit the defendant on Count Three.

Counts Two and Four of the indictment are drawn

under Section 841(a)(1) of Title 21, which so far as we are concerned with it, provides that, "It shall be unlawful for any person knowingly or intentionally to distribute or possess with intent to distribute a controlled substance."

Count Two charging possession of opium with intent to distribute it, reads as follows:

On or about the 6th day of November, 1975, within the Eastern District of New York, the defendant Arona Diop, did knowingly and intentionally possess with intent to distribute approximately 950 grams of opium, a Schedule 2 narcotic drug-controlled substance.

The essential elements of Count Two, all of which the Government must prove beyond a reasonable doubt or else you must acquit the defendant on Count Two, are the following:

First, that the defendant did possess a quantity of opium and;

Second, that the defendant understood at the time when he had it in his possession, that the substance of which he had possession was opium or some other narcotic drug and;

Third, that the defendant intended to deliver the substance to another person.



## Charge of the Court

If the Government proves all the essential elements of Count Two beyond a reasonable doubt, you will convict the defendant on Count Two. If the Government fails to prove any one or more of the essential elements of Count Two beyond a reasonable doubt, you must acquit the defendant on Count Two.

Count Four, charging possession of marijuana in the form of hashish, with intent to distribute it, reads as follows:

On or about the 6th day of November, 1975, within the Eastern District of New York, at John F. Kennedy International Airport, Jamaica, Queens, New York, the defendant, Arona Diop, did knowingly and intentionally possess with intent to distribute approximately 32 kilograms of marijuana, in the form of hashish, a Schedule controlled substance.

The essential elements of Count Four are similar to those of Count Two. The Government must prove beyond a reasonable doubt all of the following:

First, that the defendant did possess a quantity of marijuana, in the form of hashish, and;

Second, that the defendant understood at the time when he had it in his possession, that the substance of which he had possession was marijuana. in the

form of hashish, or some other illicit drug, and;

Third, that the defendant intended to deliver the substance to another person.

If the Government proves all the essential elements of Count Four beyond a reasonable doubt, you will convict the defendant on Count Four. If the Government fails to prove any one or more of the essential elements of Count Four beyond a reasonable doubt, you must acquit the defendant on Count Four.

Each Count of the indictment must be considered separately on the basis of the evidence relating to it, and your verdicts need not be the same for all counts.

"Distribute," as used in the statute and in the counts of the indictment means simply to deliver a controlled substance.

Counts One and Two of the indictment deal with opium. As I said to you earlier, under the law, opium is a Schedule 2 controlled substance and a narcotic drug. You will recall in Counts One and Two that it is an essential element of the indictments that the defendant knew that the substance in question was opium, or that he thought the substance was some other Schedule 2 or narcotic drug.



## Charge of the Court

1                   However, Counts Three and Four of the indict-  
2                   ment deal with marijuana in the form of hashish.  
3                   Marijuana or hashish is a Schedule 1 controlled sub-  
4                   stance. Thus, in Counts Three and Four, it is an  
5                   essential element of the indictment that the defendant  
6                   knew that the substance in question was marijuana  
7                   in the form of hashish, or that he thought that the  
8                   substance was some other Schedule 1 illicit drug.  
9

10                   Thus, for Counts One and Two, while the  
11                   Government must show that the defendant knew that the  
12                   substance he was dealing with was opium or some other  
13                   narcotic drug, that does not mean that he had to know  
14                   or call it by its exact chemical composition and  
15                   the correct chemical name of the drug. It is essen-  
16                   tial that the Government show beyond a reasonable  
17                   doubt that he understood that the substance was a  
18                   narcotic drug, whatever the common code or local name  
19                   given to it; that is, the Government must show that  
20                   he understood that he was participating in the illegal  
21                   narcotic drug traffic.

22                   And, for Counts Three and Four, while the Govern-  
23                   ment must show that the defendant knew that the sub-  
24                   stance he was dealing with was marijuana in the form  
25                   of hashish or some other illicit drug, that does not

mean that he had to know or call it by its exact chemical composition and the correct chemical name of the drug. It is essential that the Government show beyond a reasonable doubt that he understood that the substance was an illegal drug, whatever the common code or local name given to it; that is, the Government must show that he understood that he was participating in the illegal drug traffic.

The Government does not have to prove that knowledge by direct evidence, such as a statement coming from the defendant's own lips which those who heard him speak are able to testify to before you, or other such direct evidence. But it is necessary for the Government to prove facts and circumstances from which you are able to and do infer beyond a reasonable doubt that the defendant did know the nature of the substance he was dealing with.

Similarly, since the charges made here are charges of criminal misconduct, it must be shown that defendant acted with a guilty mind. Hence, in each count you are required to find that the defendant understood that what he was doing was illegal. That does not mean that he must know the precise United States statute involved, or indeed that any specific



statute of the United States was involved or precisely what the law was.

What is required is that you be satisfied from the evidence beyond a reasonable doubt that the defendant was conscious, that in doing what he was doing he was embarked on a course of conduct that violated the law, and that he nevertheless engaged in the activity.

Bear in mind that the charge of Counts One and Three is importation and the charge of Counts Two and Four is possession with intent to distribute. The Government does not charge and does not have to prove that the defendant owned the illicit drugs, nor need it prove who did own the drugs; but it must prove under Counts One and Three that defendant brought the drugs into this country, that he knew that what he had brought in was an illicit drug, and that he knew his actions were illegal; and it must prove under Counts Two and Four that the defendant, whether he owned the drug or not, did have the drugs in his possession, that he knew when he had it in his hands what drugs it was and that he then intended to deliver it to someone else.

I should add that the Government need not

1 establish that the quantity of opium was 950 grams,  
2 or about 35 ounces, as charged in Counts One and Two,  
3 nor must it establish that the quantity of marijuana,  
4 in the form of hashish, was 32 kilograms, as charged  
5 in Counts Three and Four. It must, however, prove  
6 beyond a reasonable doubt that the quantity was about  
7 that quantity as adjudged by seeing it.  
8

9 The evidence is that the controlled substances,  
10 the opium, hashish and marijuana, were enclosed in a  
11 bottom section of the crate, Exhibit 8, that they were  
12 not recited in the air waybill, that their combined  
13 weight was about 60 kilograms, that the weight recited  
14 in the air waybill issued by Air Afrique in Abidjan  
15 was 150 kilograms, and the re-weighing at Kennedy  
16 Airport resulted in freight charges being assessed on  
17 the basis of 270 kilograms, and that defendant had  
18 the air waybill in his possession at Kennedy Airport  
19 on November 7, 1975, and presented it with the other  
20 documents to Inspector Grabbatin.

21 The air waybill of which Exhibits A and B are  
22 counterpart copies is what is called a negotiable  
23 bill, and under the law the air carrier is not allowed  
24 to surrender the goods described in it to anyone  
25 except the person who holds the original air waybill.



## Charge of the Court

1 That gives the holder of the bill control over the  
2 shipment, and, in this case, that means control over  
3 the crate, Exhibit 8, and its contents. From that  
4 it follows that if you conclude that Mr. Diop knew  
5 all along that the controlled substances were in the  
6 bottom section of the crate, he was in conscious  
7 control of them, and would, as a matter of law, be  
8 the importer of the controlled substances.  
9

10 He would also, as a matter of law, be in what  
11 the law calls constructive possession of the controlled  
12 substances, since his holding of the air waybill gave  
13 him the power to take delivery of the crate or direct  
14 the place to which and the person to whom it was to  
15 be delivered. But, again, the big thing that you must  
16 decide is whether or not you are satisfied beyond a  
17 reasonable doubt that Mr. Diop knew when he went to  
18 pick up the crate at Kennedy Airport that the controlled  
19 substances were in the crate, Exhibit 8.

20 I have said that the Government must prove the  
21 essential elements of the crimes charged beyond a  
22 reasonable doubt.

23 Proof beyond a reasonable doubt is not proof  
24 to an absolute certainty. Few things in life can be  
25 so proved. Proof beyond a reasonable doubt is such

proof as you would be willing to rely and act upon in the most important of your own affairs.

If, after carefully weighing all the evidence you have an abiding conviction of the truth of the charge such that you feel conscientiously bound to act upon it, then you would be free from reasonable doubt. If, however, after weighing all the evidence, you have such a doubt as would cause prudent persons to hesitate before acting in matters of importance to themselves, such a doubt would be a reasonable doubt.

That does not mean that each bit of the Government's evidence must be found by you to be true beyond a reasonable doubt, it means rather that in sum total the Government's evidence must satisfy you beyond a reasonable doubt as to each element of the crime charged, or you must acquit.

A reasonable doubt may arise not only from the evidence produced, but also from the lack of evidence. Since the burden of proof is always on the Government, a defendant has the right to rely on the failure of the Government to prove any essential element of the charge. A defendant may rely, too, on evidence brought out on his cross-examination of witnesses called by the Government. The law does not



1  
2 impose on a defendant the burden or duty of producing  
3 any evidence.

4 A defendant is presumed to be innocent and that  
5 presumption accompanies him throughout the trial. It  
6 continues unless you are satisfied on all the evidence  
7 that the Government has proved defendant's guilt beyond  
8 a reasonable doubt.

9 I will not summarize the evidence. You have  
10 heard nine witnesses, to name them in the order in  
11 which they testified:

12 Gerard Brady, Charles Grabbatin, John Huber,  
13 Robert Janice, Joseph Giaimo, Matias Rodriguez, Tony  
14 Archer, Steve Glantz and Arona Diop. 26 exhibits have  
15 been received in Evidence.

16 I have said you must decide the case on the  
17 evidence. The evidence is the testimony of these  
18 witnesses and the exhibits received in evidence.

19 Statements and arguments of counsel and answers  
20 stricken from the record are not evidence.

21 The evidence includes, of course, what is brought  
22 out on cross-examination as well as what is testified  
23 under direct examination.

24 Your verdict must be based on the evidence. But  
25 in your consideration of the evidence you are not limited

1  
2 to the bare words of the witnesses and the bald facts  
3 that you find have been proved. The evidence includes  
4 the inferences reasonably to be drawn from the testimony  
5 which you hear and the facts which you find have been  
6 proved.

7 There are two types of evidence from which you  
8 may lawfully find that a fact has been proven. One  
9 is direct evidence, such as the testimony of an eye-  
10 witness to his observations of the facts to be proved;  
11 the other is circumstantial evidence, the proof of  
12 facts and circumstances which rationally imply the  
13 existence or non-existence of some other fact because  
14 such other fact usually and reasonably follows according  
15 to the common experience of mankind.

16 Thus, if you see people coming into a building  
17 shaking out dripping umbrellas and others about to go  
18 out of doors, turning back toward their offices, you  
19 infer from these circumstances that it is raining  
20 outside. Or, while you can see from your window that  
21 the sky is full of clouds and the streets are wet,  
22 you see also that passing cars are not using their  
23 windshield wipers and passersby are carrying their  
24 umbrellas folded under their arms, you infer from those  
25 circumstances that it is not raining.



## Charge of the Court

As a general rule, the law makes no distinction between direct and circumstantial evidence. If the evidence, as here, is in part indirect and circumstantial, then you apply to it, along with all the other evidence, the same standard of proof, it must, taken with the other evidence, satisfy you of the defendant's guilt, beyond a reasonable doubt, or else you must acquit.

You are the sole judges of the credibility of the witnesses. The motives and state of mind of each witness as they appear to you and the circumstances and inducements under which the witness testified are to be taken into account.

Consider the relationship each witness may bear to either side of the case and the manner in which the verdict might affect him.

The testimony of the defendant is competent and is to be judged by you by the same standards of any other witness including inevitably the effect of his interest in the outcome of the case.

You may consider the appearance and manner of each witness on the witness stand, the witness' apparent candor or lack of it, and the character of the testimony given, whether the testimony contains

1 inconsistencies or discrepancies, whether it is  
2 intrinsically credible or seems to you in whole or  
3 in part improbable, and whether it conflicts with other  
4 testimony or is consistent with other testimony in  
5 the case.  
6

7 In determining the credibility of witnesses  
8 and their testimony, the testimony of Government  
9 employees is not entitled to any greater weight  
10 simply because they are Government employees. You  
11 evaluate their testimony just as you would that of  
12 any other witness.

13 In weighing the effect of conflict or discrepancy,  
14 consider whether it pertains to a matter of importance  
15 or to unimportant details and whether it seems to you  
16 to result from innocent error or from falsehood. If  
17 you find a witness has been mistaken or untruthful,  
18 in all or in part of the testimony given, then you may  
19 give the testimony of that witness such credit,  
20 any, as you think it deserves in the light of the  
21 nature and extent of the defects that you find in it.

22 The Government has presented testimony concern-  
23 ing statements allegedly made by defendant at Kennedy  
24 Airport on November 7th and it has argued that what  
25 he there said contradicts or is inconsistent with  
his testimony here in court. You must determine



whether you are satisfied that the defendant did make such statements, whether they are inconsistent with or contradictory of his testimony here.

If you do find inconsistency or contradiction, you may consider that only in determining the defendant's credibility as a witness. From the question of his credibility as a witness, you may not treat what you find Mr. Diop said at Kennedy Airport as evidence of what the facts are. You may treat it only as nullifying those parts of defendant's testimony here which are inconsistent or contradicted by what you find he said at Kennedy Airport.

If you conclude that a witness has knowingly testified falsely concerning any material matter, you have a right to discuss that witness' testimony in other particulars. You may reject all the witness' testimony or give it or parts of it the credence you think it deserves.

I have sought not to comment on the evidence or to give any impression as to my own view, if I have one, of the relative weight of the evidence. If I have done so, however, you may disregard it entirely, for you are the sole judges of the facts.

From time to time in the course of the trial

objections have been made and rulings on evidence given. Draw no inference from the comparative frequency of objection of one or the other side or from the comparative record in having objections sustained.

When an objection to a question has been sustained, disregard the question and draw no inferences from its wording about the answer that might have been given.

Where an objection is overruled, evidence then received has no special weight just because unsuccessfully objected to.

Your verdict must be unanimous. It is your duty as jurors to consult with one another and to deliberate with a view to reaching agreement, if you can do so without doing violence to individual judgment. Each of you must decide the case for yourself but do so only after an impartial consideration of the evidence with your fellow jurors.

In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. Your task is one of conscience, and pride of opinion has no place in matters of conscience. But do not surrender your honest conviction as to the weight or effect of evidence



## Charge of the Court

solely because of the opinion of your fellow jurors  
or for the mere purpose of returning a verdict.

The form of your verdict, which must be given  
separately on each count, is simple. Your verdict  
must be either guilty or not guilty, it must be given  
separately for each count, and it must be a unanimous  
verdict on each count. Your verdict need not be the  
same on both counts.

(Continued on next page.)

1 THE COURT: (continuing) Your verdict on each  
2 count will be delivered orally here in open court by  
3 your Forelady in response to questions which the Dep-  
4 uty Clerk of the Court will address to her.  
5

6 You are not partisans. You are judges, judges of  
7 the facts. Your sole interest is to ascertain the truth  
8 from the evidence in the case.

9 When you have reached a verdict and are ready to  
10 report, simply advise the Marshall that you have reached  
11 a verdict without disclosing orally or in writing what  
12 your verdict is.

13 Your verdict must not be disclosed to anyone  
14 before you deliver it orally in the courtroom in response  
15 to the questions of the Clerk of the Court.

16 If you wish to communicate with the Court, do so  
17 in writing, using the Forelady, Juror number one as your  
18 intermediary and representative. Notify the Marshall when  
19 you have any such communication.

20 There will now be a short recess during which  
21 Counsel will review the charges with me to make certain  
22 that nothing has been omitted or misspoken. Then you  
23 will retire to the jury room to deliberate your verdict.

24 (Whereupon jurors were excused from the courtroom)

25 THE COURT: Any further requests or exceptions?



1 MR. PANZER: I have no requests or exceptions.

2 MR. TEITLER: The Government only would like to  
3 make comment to that portion of the charge which dealt  
4 with the Harris against New York Rule. Apparently, the  
5 charge I believe would lead one to understand that  
6 everything the Defendant said at the time he was at  
7 JFK Airport can be used solely to impeach the credibil-  
8 ity of the witness and for no other purpose.

9 THE COURT: You have had that charge for some  
10 time, I gave it to you in exact form in which I read it  
11 some day or two ago.

12 MR. TEITLER: Somehow your Honor, when it's read,  
13 when I heard it it sounded different to me from the way  
14 it was when I read it, and I apologize for that.

15 THE COURT: What do you suggest?

16 MR. TEITLER: The only material statement the  
17 Defendant made was that he acknowledged that he owned  
18 the crate.

19 THE COURT: He said, "This is my--" He was asked  
20 "Is this your crate?"

21 MR. TEITLER: That's the only thing that con-  
22 cerns me, and I believe it's the only material one the  
23 Defendant made.

24 MR. PANZER: I will object to any correction of  
25 the charge, your Honor.

1 THE COURT: 208(a)

2 MR. TEITLER: I would submit that this might be  
3 cured in the following manner, where the Court stated  
4 you must not treat what Mr. Diop said at Kennedy Airport  
5 --other than the statement that the crate was his. With  
6 respect to that statement, you may consider whether or  
7 not that statement proves the fact that the crate was  
8 Mr. Diop's.

9 MR. PANZER: I'll object to that, your Honor.

10 THE COURT: He has denied making that statement;  
11 direct contradiction on that.

12 MR. PANZER: I will object to the U.S. Attorney's  
13 correction. I think the charge is eminently fair as  
14 given.

15 THE COURT: I think line three--all you are  
16 entitled to are the words after the crate and its bottom  
17 compartment had been opened--

18 MR. PANZER: I will object to any correction.

19 THE COURT: Just a second, if you will. Yes, Mr.  
20 Manzer.

21 MR. PANZER: I said, your Honor, I would object  
22 to any correction. I feel that the charge as given is  
23 adequate, and I will object to the statement made by  
24 the U.S. Attorney that the Defendant didn't prove any-  
25 thing. I believe the Court did tell the jury at the



1 time that the Defendant does not have to prove anything.

2 THE COURT: And I reiterated it in the formal  
3 charge, but this is simply just a question of what  
4 statements are reduced in evidentiary value below the  
5 quality of the admission, and it's only those which were  
6 suppressed, that is those statements that were made  
7 after the crate had been opened and the contents of the  
8 lower part of it exposed. I think Government Counsel is  
9 entitled to that. He should have brought it to my atten-  
10 tion. I'll reread that page with the charge. You are  
11 allowed your exception.

12 MR. PANZER: Your Honor, thank you.

13 (Whereupon jurors returned to the courtroom, are  
14 now seated in the jury box)

15 THE COURT: Counsel has drawn to my attention one  
16 part of the charge which requires a little complication  
17 and it's that part dealing with certain statements that  
18 the Agent testified to when they were recalled as wit-  
19 nesses.

20 "The Government has presented testimony concern-  
21 ing statements allegedly made by Defendant at Kennedy  
22 Airport on November 7th after the crate and its bottom  
23 compartment had been opened, and it has argued that  
24 what he there said contradicts or is inconsistent with  
25 his testimony here in court. You must determine whe-

1 ther you are satisfied that the Defendant did make such  
2 statements and whether they are inconsistent with or  
3 contradictory of his testimony here. If you do find  
4 inconsistency or contradiction, you may consider that  
5 only in determining the Defendant's credibility as a  
6 witness. Apart from the question of his credibility as a  
7 witness, you may not treat what you find Mr. Diop said  
8 at Kennedy Airport after the crate and its bottom com-  
9 partment had been opened as evidence of what the facts  
10 are. You may treat it only as nullifying those parts of  
11 the Defendant's testimony here which are inconsistent  
12 with or contradicted by what you find he said at Kennedy  
13 Airport."

14 MR. PANZER: If they find that he said so.

15 THE COURT: That's emphasized in the charge.

16 If you don't believe he ever said those things  
17 you don't have this problem, if you do you do.

18 MR. PANZER: Thank you.

19 THE COURT: The Marshalls will now be sworn to  
20 take you into custody and keep you in custody until you  
21 reach a verdict. I'm sure it's the first time that any  
22 of you have ever been in custody.

23 (Whereupon two Marshalls were sworn in by the  
24 Clerk of the Court)  
25



1 December 14, 1974, that the case -- the name escapes  
2 me -- where in the instance of a written acknowledgment,  
3 if a defendant fails to sign a document that fact goes  
4 to the weight of the evidence rather than its  
5 disability. In this particular instance there was no  
6 written waiver presented to the defendant, and therefore  
7 I think it could fairly be stated that that case, and  
8 the case line just established by learned defense  
9 counsel is really irrelevant.

10 THE COURT: All right, very well.

11 The case on this point is a surprisingly close  
12 one, and the Court is not helped by what appears to  
13 be the defendant's palpable want of candor. That,  
14 however, does not decide the issue against him. The  
15 evidence of Charles Grabattin, of Joseph Giaiamo;  
16 John Cupa and Gerard Brady makes it perfectly clear  
17 that on the occasion of the defendant's visit to  
18 Kennedy Air. rt on November 7th, he dealt  
19 unprotestingly with all of these people in English,  
20 which some of them said -- Mr. Brady for example --  
21 that they didn't even notice an accent; others said  
22 heavily accented; nobody said it was incomprehensible  
23 English.

24 He didn't ask for an interpreter; he didn't  
25 give any indication that in the commercial dealings

1 he had any problems of trying to get what he wanted  
2 accomplished. There isn't any contention that Mr. Diop  
3 is completely ignorant to English. The evidence is so  
4 overwhelmingly against it that it could not be found  
5 that he is without English. He has some knowledge of  
6 English in both speaking and understanding.

7 The contention is rather to put it in summary  
8 terms that he was not sufficiently versed in English  
9 to deal with the occasion of being asked to waive his  
10 right, to stand silent. Now, there is here a very  
11 strange kind of situation. I hold and find that the  
12 agents who dealt with him, Mr. Grabattin, Mr. Giaiamo,  
13 Mr. Cupa were not alerted to the idea that the man's  
14 English was inadequate to the occasion.

15 To a certain extent his unprotesting use of  
16 English at the airport led them to deal with him in  
17 English and they did; all three of them. I suppose  
18 there are a great many people in and around the airport  
19 who speak French. I would be unsurprised if there  
20 wasn't in the Pan Am hangar people who did not speak  
21 French. I would wonder if there were any who spoke the  
22 African dialect which was also native to Mr. Diop's  
23 upbringing, but there is nothing to indicate that at any  
24 time Mr. Diop indicated the preference to use French,  
25 even when he got to the more difficult and troublesome



1 ground of dealing with a legal issue, the importance  
2 of which one would guess he might have known from his  
3 time spent in this country; and if I may say so, his  
4 own passport with a showing of extensive travel, not  
5 simply between this country and Africa but Paris, India,  
6 with an indication that his visa to enter India was  
7 obtained in the United States and that some American  
8 consulate or other office -- if I am reading the  
9 passport correctly, we don't have a great deal of  
10 collateral situations -- that the man is as he put it  
11 himself once, not a stupid man, and as one would be  
12 compelled to add, he is a man who has been around.

13 He was first here in 1972 and '73, and here  
14 apparently as long as eight months in one stretch.  
15 He chauffeured for the Embassy, and I would venture to  
16 guess, in addition to French and the native African  
17 language, there must certainly have been considerable  
18 English in and around the embassy, so it's -- that  
19 the man felt quite equal dealing with the financial  
20 transaction in English. And it is unsurprising that  
21 he did so in such a way as to trap the Government men,  
22 although that was not his purpose, assuming that  
23 they could safely deal with him on the larger and more  
24 important subject in English, but when they came to  
25 find that they had before them a man who was apparently

1 deeply involved in a very grave offense, one punishable  
2 by fifteen years in prison and a fine of twenty-five  
3 thousand dollars; or if all they had on earth was the  
4 hashish, an offense punishable by five years in prison,  
5 they went ahead and dealt with him in English.

6 Now, I must find that Mr. Diop as a witness  
7 seemed to be full of self-esteem and self-assurance,  
8 very ready to lay it on others- I venture to guess that  
9 he lacked the discretion, the sense of healthy fear that  
10 should have warned him that the situation had suddenly  
11 gotten quite beyond him, but he ran his neck into the  
12 noose.

13 Is that the way the Miranda case works? I think  
14 not. I'm afraid that when it's a matter of the  
15 conscious waiver of the known constitutional right more  
16 must be present; man being unequal to a simple confession  
17 of his own inadequacy to deal with the situation as  
18 it suddenly got behind him.

19 Now, when I say that the Government was trapped,  
20 I mean exactly that, but I think that they were, and  
21 at that point one could only have hoped that some rare  
22 sixth sense could have warned them that they'd better  
23 get someone in there who could talk to him in a tongue  
24 that he could better understand, because the whole  
25



1 plateau of comprehension required to the occasion had  
2 suddenly changed, moved up a thousand feet from the  
3 common commercial level.

4 I think Government counsel showed very  
5 effectively, like businessmen, insurance men, he signed  
6 a good many papers that he shouldn't have signed  
7 without reading. I've heard people say you can't read  
8 a lease before you sign it because if you did you  
9 wouldn't sign it. You know, it's horror beyond all  
10 horrors, you cover the text and sign it. It's a  
11 contract of adhesion or a pistol to the head contract.  
12 We all sign those things. We buy insurance policies  
13 and say this time I am going to read them and by the  
14 time you begin to read it you say well, I just hope my  
15 agent warns me about these things; and I'm afraid much  
16 of what Government counsel so easily brought out did  
17 operate at that practical stage where you are signing  
18 a sort of contract of adhesion, a necessary paper which  
19 you sign for its effect, such for example, the forms  
20 that Mr. Brady presented to him. Mr. Brady told him.  
21 this is how you get released quick, getting the whole  
22 thing put through the total clearance procedure;  
23 shoved them in front of him, he signed them. I have  
24 seen defendants in precinct station houses sign  
25 insurance company indemnification agreements, similar

1  
2 circumstances. If you stop to read them you'd be in  
3 jail all night. The purpose of getting the hurry-up  
4 bail is lost, just sign them and you are out and hope  
5 that you haven't signed anything that would have you  
6 deal with it more effectively at some later occasion.  
7 What you are really interested in is how much is the  
8 bond going to cost.

9 For these reasons, I would be compelled to  
10 conclude the Government has not borne the burden of  
11 establishing that the defendant consciously waived a  
12 known constitutional right not to incriminate himself  
13 by what he said to the officer.

14 Now, that would not apply, as I understand the  
15 evidence, to the first part of what he said, to  
16 Charles Grabattin, if I understood Mr. Grabattin's  
17 somewhat wooden testimony correctly.  
18  
19  
20  
21  
22  
23  
24  
25



1 THE COURT: (Continuing) It is my understanding  
2 that Mr. Grabattin in substance testified that at the  
3 first meeting with Mr. Diop he said to him in substance,  
4 are you picking up this bit of cargo for yourself or  
5 for someone else, and he said for myself; that this was  
6 before Mr. Grabattin had looked into the carton or the  
7 crate; and I assume, because I don't know what the  
8 evidence is, that the United States did not through any  
9 of its agents at that time know of or suspect the  
10 presence of a controlled substance concealed in the  
11 crate, because if it did, what I say at this point has  
12 no application, because then this interrogation would  
13 force your argument to go out.

14 What I do say, if at this part of the  
15 interrogation the Government was unsuspicious this may  
16 be shown. Then he was asked, who are you, he was asked  
17 to identify himself and produce a New York operator's  
18 license, and that he then in response to questions of  
19 Mr. Grabbatin, in which he pointed to different items  
20 on one or another of the invoices, described the  
21 merchandise or told Mr. Grabbatin what the different  
22 items were, such as the one musical instrument; another  
23 one was a name for a carving, and they were the names  
24 of African musical instruments. Now, that part, before  
25

1 Mr. Grabbatin poked into the crate and discovered the  
2 material, I think is reasonable in evidence, because  
3 at that point, everything was completely free of any  
4 suspicion or wrongdoing and on the assumption of  
5 defendant's innocence. He, too, would have been not  
6 dealing with the situation with any constitutional  
7 right except Custom duty -- and I think we could glean  
8 from what Mr. Brady told us that apparently the  
9 articles were duty-free, so that there was a proper  
10 reason for asking for purposes of Customs clarification  
11 what they were. I must say the Government presented  
12 the issue on the Government's behalf as well as it  
13 could be presented. I wish in a way that the issue was  
14 one, if decided against the Government, the Government  
15 felt was dispositive, so it felt could have taken an  
16 appeal.  
17

18 I'm very conscious that this point of subjective  
19 and objective test may not have been sharply brought  
20 out in any preceding case, and I would be a foolish  
21 man if I were to say to you that I have total  
22 confidence that my view of it has something, depending  
23 on Defendant's subjective state of mind is critical  
24 and dispositive, but it seems to me that that's the  
25 nature of it, and in the absence of anything unreal



1 about it, it would normally be decisive; but I did  
2 inquire earlier, and I can see through what is seen  
3 of the evidence thus far, perfectly reasonable view  
4 from Mr. Tietler that the Government would proceed with  
5 the case whether or not the statements were receivable.  
6 I should say by the way that I do take into account  
7 what Mr. Tietler earlier emphasized; at a final point  
8 the defendant and the evidence of one of the Government  
9 witnesses did say he wanted a lawyer. On that one,  
10 I am not sure that I would not accept Mr. Diop's  
11 testimony, that at that point he made some reference to  
12 wanting to get in touch with the embassy.

13 It seems to me, if I may say so more in character.

14 Now, I do think that some timing can be accorded  
15 to the circumstance that nothing went to the point  
16 where the Government people felt able to ask for or  
17 got a written statement or an acknowledgment that the  
18 warnings had been given. That doesn't seem to me to be  
19 a potent circumstance here.

20 Did you want to reconsider that with Mr. Dawson?

21 We'll take a short recess.

22 (Whereupon, a recess was taken.)  
23  
24  
25

CERTIFICATE OF SERVICE

July 28, 1976

I certify that a copy of this brief and appendix  
has been mailed to the United States Attorney for the  
Eastern District of New York.

Barthelme J. Silberman